STPONED TO MERITS
JUN 9 - 1924

No. 336

IN THE

Supreme Court of the United States

APRIL TERM, 1924

S. F. LEE, ET AL.,
Petitioners,

vs.

OSCEOLA & LITTLE RIVER ROAD IMPROVEMENT DISTRICT NO. 1 OF MISSISSIPPI COUNTY, ARKANSAS, Respondent.

PETITION FOR CERTIORARI

CHAS. M. BRYAN,
PREWITT SEMMES,
D. F. TAYLOR,
Attorneys for Petitioners.

IN THE

Supreme Court of the United States

APRIL TERM, 1924

B. F. LEE, ET AL.,
Petitioners,

vs.

OSCEOLA & LITTLE RIVER ROAD IMPROVEMENT DISTRICT NO. 1 OF MISSISSIPPI COUNTY, ARKANSAS, Respondent.

PETITION FOR CERTIORARI

To the Honorables the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, B. F. Lee, et al., respectfully represent:

That prior to September 19th, 1923, respondent filed in the Chancery Court of Mississippi County, Arkansas, two complaints against the lands of petitioners, charging that such lands are liable for special improvement tax for road purposes, and asking that the lands of petitioners be sold to satisfy the payment of such taxes.

Petitioners answered these complaints, denying liability under such special improvement tax, for the reason that at the time of the organization and creation of the respondent road district, title to all of the lands of petitioners was in the United States Government, and the subsequent alienation of such lands by the United States Government to petitioners did not subject them to the special improvement tax levied by a district created prior to such alienation; and, further, denying the validity of the assessment under authority of Sections 5429 and 5430 of Crawford & Moses Digest of the Statutes of the State of Arkansas.

The two causes were consolidated, and on the 19th day of September, 1923, the Chancery Court of Mississippi County, Arkansas, rendered a decree against petitioners, directing that the lands of petitioners be sold to satisfy the payment of such improvement tax, penalty, interest, and costs.

An appeal was prayed by petitioners to the Supreme Court of Arkansas, being the highest appellate Court in said State of Arkansas, and on the 14th day of January, 1924, the Supreme Court of Arkansas affirmed the decree of said Chancery Court of Mississippi County.

Petitioners pray the Court for a writ of certiorari, and submit that this is a proper case for the granting of said writ for the following, among other, reasons:

I.

The special improvement tax assessed against the lands of petitioners is a violation of petitioners' rights under the Fourteenth Amendment to the Constitution of the United States.

II.

The ruling of the Supreme Court of Arkansas that when title passed from the United States to petitioners the lands of petitioners became subject to special assessment for public improvements, is a violation of the rights of petitioners under the Fourteenth Amendment to the Constitution of the United States, in that it deprives appellants of their property without due process of law.

III.

The assessment of the lands of appellants under the provisions of Sections 5429 and 5430 of Crawford & Moses Digest of the Statutes of the State of Arkansas is in violation of the rights of petitioners under the Fourteenth Amendment to the Constitution of the United States, for the reason that the provisions of Sections 5429 and 5430 of Crawford & Moses Digest of the Statutes of the State of Arkansas apply only to the re-assessment of lands, the owners of which have been given an opportunity to be heard in opposition to the creation of the special improvement district, and do not apply to a case where the owners of property have not been so given an opportunity to be heard in opposition to the creation of such district.

IV.

The ruling of the Supreme Court of Arkansas that the provisions of Sections 5429 and 5430 of Crawford & Moses Digest of the Statutes of the State of Arkansas are valid in so far as they affect the lands of petitioners is erroneous, and is in violation of the rights of petitioners under the Fourteenth Amendment to the Constitution of the United States.

V.

In the application of Sections 5429 and 5430 of Crawford & Moses Digest of the Statutes of the State of Arkansas to the assessment in the instant case petitioners are deprived of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

VI.

The Supreme Court of Arkansas is in error in holding that the respondent district might, without violating the Fourteenth Amendment to the Constitution of the United States, exercise authority to assess the property of petitioners for special benefit resulting from an improvement which had been previously made, and which authority to so assess said property was held by the Supreme Court of Arkansas to be conferred upon respondent district by Sections 5429 and 5430 of Crawford & Moses Digest of the Statutes of the State of Arkansas.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari may be issued out of and

under the seal of this Court, directed to the Supreme Court of the State of Arkansas, commanding said Supreme Court of Arkansas to certify and send to this Court on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings in said Supreme Court of Arkansas, in the case entitled B. F. Lee, et al., Appellants, v. Osceola & Little River Road Improvement District No. 1 of Mississippi County, Arkansas, Appellee, No. 8295, to the end that the said case may be reviewed and determined by this Court, or that your petitioners may have such other or further relief or remedy in the premises as to this Court may seem proper, and that the said judgment of the Supreme Court of Arkansas in said cause and every part thereof may be reversed by this Honorable Court; and your petitioners will ever pray.

Chas. M. Burg

Attorneys for Petitioners.

STATE OF TENNESSEE,
COUNTY OF SHELBY.

Chas. M. Bryan, being duly sworn, says:

That he is of counsel for B. F. Lee, et al., the foregoing petitioners; that he prepared the foregoing petition, and the allegations thereof are true, as he verily believes.

Chas. M. Bryan

Sworn to and subscribed before me this 9th day of April, 1924.

Marguerite Heany
Notary Public.

My commission expires April 19, 1926

TO THE RESPONDENT IN THE FOREGOING CASE:

You are hereby notified that we will submit to the Supreme Court of the United States the foregoing petition for a writ of certiorari, at the opening of the Court, on the.....day of....., 1924.

.....

Attorney for Petitioners.

A copy of the petition for certiorari in the above entitled cause received, and service accepted by the undersigned, this.....day of April, 1924.

.....

Attorney for Respondent.

IN THE

Supreme Court of the United States

APRIL TERM, 1924

B. F. LEE, ET AL., Petitioners,

vs.

OSCEOLA & LITTLE RIVER ROAD IMPROVEMENT DISTRICT NO. 1 OF MISSISSIPPI COUNTY, ARKANSAS, Respondent.

BRIEF IN SUPPORT OF FOREGOING PETITION

A.

It is not denied that assessments for local improvement upon property of the United States are void.

Ahern v. Board of Improvement District No. 3, 69 Ark. 68; 61 S. W. 575.

Board of Improvement v. School District of Little Rock, 56 Ark. 354; 19 S. W. 969.

It is the **present** enhancement in value of property included within an improvement district which validates the assessments, and property upon which special assessments are levied must receive a peculiar benefit equal to or in excess of the cost of the improvement in order to be upheld.

Nettles v. Hazlewood Road Improvement District No. 2 of Green County, 223 S. W. 397.

B.

Lands included within the limits of a special improvement district at the time such lands are the property of the United States Government, and which lands are subsequently sold by the Government to individual patentees, cannot be held liable for special improvement assessments levied under pretended authority of such district.

Nevada National Bank of San Francisco v. Poso Irrigation District (Russell, intervener), 73 Pac. 1056.

Pierce, et al., v. Drainage District No. 17, Mississippi County, 244 S. W. 342.

(The case of Pierce, supra, is now pending in this Court on writ of error.)

C.

Sections 5429 and 5430 of Crawford & Moses Digest of the Statutes of the State of Arkansas provide only for the **re-assessment** of lands the owners of which have been given an opportunity to be heard in opposition to the creation of the district, and do not apply to a case, such as the instant one, where the owners of property have not been so given such opportunity to be heard in opposition to the creation

of the district, but have only been given an opportunity to resist the amount of the assessment which is to be levied regardless of the opposition of the owners of such lands to the original organization of the improvement district.

We do not deny that assessments for local improvements may be validly made after the improvement has been completed, but we do earnestly insist that in all of such cases where such assessments have been upheld, the taxing powers have complied with the basic law, while in the instant case the assessments upon the lands of petitioners have been made under authority assumed to have been conferred by Sections 5429 and 5430 of Crawford & Moses Digest of the Statutes of the State of Arkansas, which sections do not in fact confer such authority.

We respectfully urge upon the Court that the decision of the Chancery Court of Mississippi County and the decision of the Supreme Court of Arkansas is a taking of private property without compensation therefor, and is in violation of the Fourteenth Amendment to the Constitution of the United States, in that it denies petitioners due process of law.

Respectfully submitted,

CHAS. M. BRYAN,
PREWITT SEMMES,
D. F. TAYLOR,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

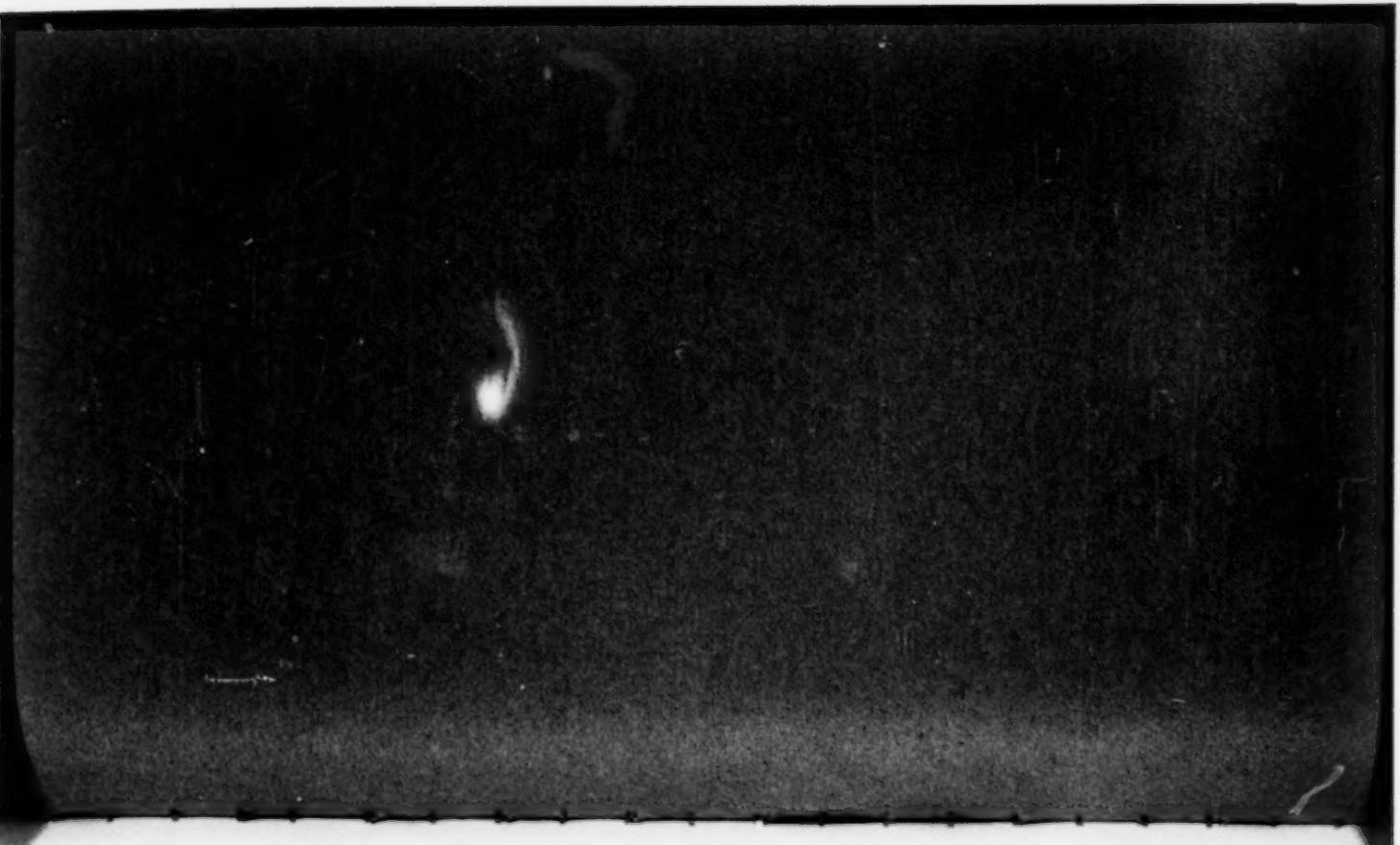
B. F. LEE, ET AL.,
Petitioners,

vs. No. 33

DEPOLA LITTLE RIVER ROAD IM-
PROVEMENT DISTRICT NO. 1 OF
MISSISSIPPI COUNTY, ARKANSAS,
Respondent.

ANSWER TO PETITION FOR CERTIORARI

THAD H. BROWN,
PERCY C. GOODWIN,
B. F. TAYLOR,
Attorneys for Petitioners.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1923

B. F. LEE, ET AL,
Petitioners,

vs. No. 905

OSCEOLA-LITTLE RIVER ROAD IMPROVEMENT DISTRICT No. 1 OF MISSISSIPPI COUNTY, ARKANSAS,
Respondent.

AMENDMENT TO PETITION FOR CERTIORARI

To the Honorables the Chief Justice and Associate Justices of the Supreme Court of the United States.

Your petitioners, B. F. Lee, et al, respectfully show to the Court:

That they desire to supplement their original petition for certiorari and brief in support thereof in the above cause by setting out verbatim the provisions of Sections 5429 and 5430 of Crawford & Moses

Digest of the Statutes of the State of Arkansas, which are as follows, to-wit:

Section 5429. Whenever the commissioners or any owners of real property find that by reason of any change of plans or alteration thereof, or by the construction of any lateral roads or extension into adjoining territory, the assessment of benefits previously made on any land has become inequitable by reason of said change, they may petition the county court to equalize, lower or raise the said assessment, and when such petition is filed it shall be the duty of the county court to instruct the assessors for said district to reassess the benefits upon the lands or other real property of those complaining after such changes have been made or latteral roads constructed or extensions made, and said assessment shall be approved by the county court, or increased or diminished, and as reassessed shall be final and binding on the property, but when such an assessment is made in accordance with this section if the district has issued bonds or other negotiable evidences of indebtedness the total amount of the assessed benefits in the district shall not be diminished. From such assessment appeal may be taken as herein provided by Section 5424, but any appeal taken shall affect only the particular tract of land concerning which said appeal was taken.

Section 5430. The board of commissioners may not oftener than once a year order a reassessment of the benefits, which shall be made, advertised, revised and confirmed as in the case of the original assessment and with like effect; but if the district shall have issued interest-bearing evidence of the debt, the total amount

of the assessed benefits shall never be diminished.

Chas. W. Bryan

Attorney for Petitioner.

A copy of the foregoing supplement to the petition for certiorari in the above entitled cause received, and service accepted by the undersigned, this.....day of July, 1924.

.....

Attorney for Respondent.

Office Supreme Court, U.
FILED
MAR 4 1925
WM. R. STANSBURY
CLERK

No. 399.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1924.

B. F. LEE, et al.,
Plaintiffs in Error,
vs.
OSCEOLA & LITTLE RIVER ROAD IMPROVEMENT DISTRICT NO. 1 OF MISSISSIPPI COUNTY, ARKANSAS,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

BRIEF FOR PLAINTIFFS IN ERROR.

D. F. TAYLOR
CHARLES M. BEYAN
PREWITT SEMMES,
Counsel for Plaintiffs in Error.

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DETROIT

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No. 336.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1924.

B. F. LEE, et al.,
Plaintiffs in Error,
vs.
OSCEOLA & LITTLE RIVER ROAD IMPROVEMENT DISTRICT NO. 1 OF MISSISSIPPI COUNTY, ARKANSAS,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF FACTS.

This action was brought in the Chancery Court for the Osceola District of Mississippi County, Arkansas, by defendant in error, a road improvement district, against the lands of plaintiffs in error, to collect an assessment for benefits levied against said lands (R. 1-5).

The improvement district was created under Sections 5399, et seq., Crawford & Moses' Digest of the Statutes of the State of Arkansas (the pertinent provisions of which will be referred to hereafter), providing for the establishment of road improvement districts (R. 14).

At the time of the organization of the road improvement district, and the construction of the improvement, the United States was the owner of all the lands involved in this suit (R. 9).

Plaintiffs in error, or their grantors, homesteaded the lands under an Act of Congress, and title to the lands passed from the United States to them or their grantors (R. 9).

After plaintiffs in error acquired title to the lands from the United States, the Board of Assessors of the improvement district reassessed all of the lands within the district, including the lands in controversy in this suit (R. 14).

The reassessments were regularly made and confirmed, according to the statute (which will be referred to hereafter) (R. 14).

The validity of the assessments was controverted in the Trial Court and in the Supreme Court of Arkansas, plaintiffs in error contending that title to the lands being in the United States at the time the improvement district was organized, and the improvement constructed, the assessment against the lands is void *ab initio,* notwithstanding the fact that, at the time the assessment was made, they were the owners of the land (R. 14).

The Trial Court found for defendant in error and decreed that the statutory lien of the assessment be foreclosed and the lands sold to pay the assessment (R. 10-12).

The Supreme Court of Arkansas affirmed the decree (R. 15), and Writ of Error to this Court was prayed and granted (R. 18-19).

ASSIGNMENTS OF ERROR

I.

The Supreme Court of Arkansas erred in holding that the special improvement tax assessed against the lands of plaintiffs in error is a valid lien upon such lands and is not in violation of the rights of plaintiffs in error under the Fourteenth Amendment to the Constitution of the United States.

II.

The Supreme Court of Arkansas erred in holding that the lands in question, when the title passed from the United States to plaintiffs in error, became subject to special assessments for public improvements, and that such assessment is not in violation of the Fourteenth Amendment to the Constitution of the United States, in that it deprives plaintiffs in error of their property without due process of law.

III.

The Supreme Court of Arkansas erred in holding that the assessment of the lands of plaintiffs in error could be lawfully made under the provisions of sections 5429 and 5430 of Crawford & Moses' Digest of the Statutes of the State of Arkansas, for that the provisions of sections 5429 and 5430 of Crawford & Moses' Digest of the Statutes of the State of Arkansas provide only for the reassessment of lands, the owners of which have been given an opportunity to be he heard in opposition to the creation of the special improvement district, and do not apply to a case where the owners of property have not been so given an

opportunity to be heard in opposition to the creation of such district, and that by such holding plaintiffs in error are deprived of their property without due process of law.

IV.

The Supreme Court of Arkansas erred in holding that Sections 5429 and 5430 of Crawford & Moses' Digest of the Statutes of the State of Arkansas are valid insofar as they affect the lands of plaintiffs in error because said Sections 5429 and 5430 of Crawford & Moses' Digest of the Statutes of the State of Arkansas are in violation of the rights guaranteed plaintiffs in error under the Fourteenth Amendment to the Constitution of the United States, as such sections of said statutes have been construed by the Supreme Court in the instant case.

V.

The Supreme Court of Arkansas erred in holding that in the application of Sections 5429 and 5430 of Crawford & Moses' Digest of the Statutes of the State of Arkansas to the instant case plaintiffs in error are not deprived of property without due process of law.

VI.

The Supreme Court of Arkansas erred in holding that the defendant in error might, without violating the Fourteenth Amendment, exercise authority to assess the property of plaintiffs in error on account of special benefits resulting from an improvement which had already been made, which authority to so assess the property of plaintiffs in error was held by the Supreme Court of Arkansas to be granted to defendant in error under Sections 5429

and 5430 of Crawford & Moses' Digest of the Statutes of the State of Arkansas.

ARGUMENT

HAS THE JURISDICTION OF THIS COURT BEEN PROPERLY INVOKED?

Before coming to a consideration of this case upon its merits, we shall discuss briefly the propriety of bringing the case before this Court. This is determined by three propositions:

(1) Was there a right involved which is the creation of the Federal Constitution?

(2) Was this right brought to the attention of the State Court?

(3) Was the decision of the State Court against the right claimed under the Federal Constitution?

(1)

Plaintiffs in error are the owners of lands homesteaded from the United States. Defendant in error is a road improvement district created by an act of the Legislature of the State of Arkansas, embodied in Crawford & Moses' Digest as Section 5399, et seq. At the time of the organization of the district and the construction of the improvement these lands were owned by the United States (R. 9). After title passed from the United States to plaintiffs in error an assessment was made by the Board of Assessors of defendant in error against these lands for the improvement constructed while the lands were owned by the United States (R. 14). If this assessment is void, *ab initio*, as we shall attempt to show hereafter, the lien of the assessment asserted by defendant in error and confirmed by the Supreme Court of Arkansas is a

taking of property without due process of law in violation of the rights of plaintiffs in error under the Fourteenth Amendment to the Constitution of the United States.

In *Spencer v. Merchant,* 125 U. S., at page 352, this Court said:

> "The question submitted to the Supreme Court of the State was whether this assessment on the plaintiff's lot was valid. He contended that the statute of 1881 was unconstitutional and void, because it was an attempt by the legislature to validate a void assessment, without giving the owners of the lands assessed an opportunity to be heard upon the whole amount of the assessment. He thus directly, and in apt words, presented the question whether he had been unconstitutionally deprived of his property without due process of law, in violation of the first section of the Fourteenth Amendment to the Constitution of the United States, as well as of art. 1, sec. 7, of the Constitution of New York; and no specific mention of either constitutional provision was necessary in order to entitle him to a decision of the question by any court having jurisdiction to determine it. The adverse judgment of the Supreme Court, affirmed by the Court of Appeals of the State, necessarily involved a decision against a right claimed under the Fourteenth Amendment to the Constitution of the United States, which this court has jurisdiction to review. (Citing cases)."

It makes no difference that the statute (Sections 5399, et seq), *as written, is not attacked. The statute, as administered by the defendant in error, and justified by the Supreme Court of Arkansas, is attacked,* and is asserted to be a violation of the Constitution of the United States.

> *Myles Salt Company v. Iberia Drainage District,* 239 U. S. 484.

(2)

The attention of the Supreme Court of Arkansas was called to the assertion of the claimed right under the Fourteenth Amendment, and the Supreme Court of Arkansas considered the question (R. 8; R. 15).

Spencer v. Merchant, 125 U. S. 352;

St. L. I. M. & So. Ry. Co. v. Starbird, 243 U. S. 598;

St. L. I. M. & So. Ry. Co. v. Hesterly, 228 U. S. 702;

Miedrich v. Lauenstein, 232 U. S. 236;

Carlson vs. Washington, 234 U. S. 103;

Mallinchrodt Chemical Works v. Missouri, 238 U. S. 41;

Cissna v. Tennessee, 246 U. S. 289;

Northern Pacific Railway Co. v. Solum, 247 U. S. 477;

Dickinson v. Stiles, 246 U. S. 631.

(3)

The Supreme Court of Arkansas (the highest court of Arkansas) decided against the right claimed under the Federal Constitution (R. 15).

SUBSTANTIALITY OF QUESTION.

The question here presented *HAS NEVER BEEN PASSED UPON BY THIS COURT.*

We come now to a discussion of the question involved:

Is the assessment against the lands of plaintiffs in error void?

Although six assignments of error are urged in this

cause, the questions necessary to be determined are only two, viz:

(1) Can lands, the property of the United States at the time of the organization of defendant in error improvement district, and at the time of the construction of the improvement, be legally assessed, *in any manner,* for a portion of the cost of the improvement, after title has passed from the United States?

(2) Assuming that the lands *might, by proper proceedings,* be subject to assessment, is the assessment in the instant case justified by the law under which defendant in error proceeded, which administration of the law by defendant in error, the Supreme Court of Arkansas approved?

If the assessment, upon the face of it, is void, it may be successfully attacked collaterally.

Reitzammer v. Desha Road Imp. Dist., 139 Ark. 168;

Summers v. Conway & Damascus Rd. Imp. Dist., 139 Ark. 277;

Nettles v. Hazlewood Road Imp. Dist., 144 Ark. 632;

Sikes v. Douglas, 147 Ark. 469;

Pierce v. Drainage District No. 17, 155 Ark. 89.

Defendant in error concedes, and the Supreme Court of Arkansas decided, that assessments for local improvements upon property of the United States are void (R. 14).

Ahern v. Board of Improvement District No. 3, 69 Ark. 68; 61 S. W. 575;

Board of Improvement v. School District of Little Rock, 56 Ark. 354, 19 S. W. 969;

Irwin v. Wright, County Treasurer, 257 U. S. 219.

It is asserted by defendant in error, and declared by the Supreme Court of Arkansas, that when the United States

ceases to have any proprietary interest in property, it becomes subject alike to general taxation, and to special assessment for local improvements (R. 15). True, after title has passed from the United States, the lands are subject to general taxation, and to special assessment for local improvement, *from that time on.*

It does *not follow,* however, with like reason, that the lands would be subject to special assessment for local improvements *constructed prior to the passing of title from the United States,* and the decision of the learned Supreme Court of Arkansas is, in our opinion, due to the failure of that learned Court to apply to this case the distinction between the underlying theories of *general* taxes and *so-called taxes,* which are, in reality, special assessments for local improvements.

Nowhere is this distinction more forcibly expressed than in the case of *Illinois Central Railroad Company v. Decatur,* 147 U. S. 197, where Mr. Justice Brewer said:

> "Between taxes, or general taxes as they are sometimes called by way of distinction, which are the exactions placed upon the citizen for the support of the government, paid to the State as a State, the consideration of which is protection by the State, and special taxes or special assessments, which are imposed upon property within a limited area for the payment for a local improvement supposed to enhance the value of all property within that area, there is a broad and clear line of distinction, although both of them are properly called taxes, and the proceedings for their collection are by the same officers and by substantially similar methods. Taxes proper, or general taxes, proceed upon the theory that the existence of government is a necessity; that it cannot continue without means to pay tis expenses; that for those means it has the right to compel all citizens and property within its limits

to contribute; and that for such contribution it renders no return of special benefit to any property but only secures to the citizen that general benefit which results from protection to his person and property, and the promotion of those various schemes which have for their object the welfare of all. "The public revenues are a portion that each subject gives of his property in order to secure or enjoy the remainder" (Citing cases)."

"On the other hand, special assessments or special taxes proceed upon the theory that when a local improvement enhances the value of neighboring property that property should pay for the improvement. * * *"

The Court then quotes from Cooley on Taxation, page 416, c. 20, sec. 1:

* * * "The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby, their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay * * *."

The Supreme Court of Arkansas, in the case of *Nettles v. Hazlewood Road Improvement District No. 2 of Greene County,* reported in 223 SW 397, speaking through the same Justice who rendered the opinion in the instant case, said:

"The principle upon which special assessments for local improvements are sustained is that the lands upon which the assessments are levied receive a peculiar benefit equal to or in excess of the cost of the improvement, and that, therefore, the land owners do not pay anything in excess of what they receive by reason of such improvement."

It is the *present* enhancement in value of the property included within an improvement district and upon which assessments are levied, which authorizes the assessments for local improvements, and unless the lands upon which the special assessments are levied receive a peculiar benefit equal to or in excess of all the cost of the improvement, the special assessment for local improvement must fail.

At the time of the organization of defendant in error, and at the time of the construction of the improvement, the lands in question here were the property of the United States (R. 9). The benefits which accrued to such property accrued at the time the property was so owned. The enhancement in value by reason of which the benefits accrued to the property was an enhancement in value *at that time*. All the lands within the district, were, at the time of the creation of the district and the construction of the improvement, enhanced in value, in theory at least, in an amount equal to or in excess of the cost of the improvements, and the lands of plaintiffs in error were similarly enhanced in value at that time. When the lands were subsequently transferred by the United States to plaintiffs in error they were transferred in their enhanced value, and unless violence is to be done to the true theory of special assessments for local improvements, these lands cannot be assessed for a local improvement which was constructed by a district created at a time when the title to the lands was in the United States.

In the case of *Nevada National Bank of San Francisco v. Poso Irrigation District* (Russell, Intervener), 73 Pac. 1056, Mrs. Russell, the intervener, resisted the enforcement of a lien for irrigation assessment upon lands which were included within the limits of the irrigation district when

such lands belonged to the United States, and which lands were subsequently sold by the government to her grantor.

The Supreme Court of California held that such lands were not only not liable under a judgment rendered against the district in an action on its bonds, but were *exempt from any assessment* under the statute for the payment of the bonds.

The Court said:

> "Assuming the regularity and validity of the organization of the district and the issuance of the bonds, except as to the land now owned by the intervener, and hereinbefore described, the question is presented whether her said land is liable, by assessment under the act of the legislature, *or in any manner,* for the payment of the bonds held by the plaintiff. I think it is not. *The intervener's land was not represented in the organization of the district by any person authorized to vote for or against its organization.* If the act of the Legislature, under which the district was organized, had expressly declared that public lands of the United States, situated within the exterior boundaries of an irrigation district, should be a part thereof, and assessed for its proportion of the liabilities of the district, no one would hesitate to say that such provision would be void; that neither the state, nor any of its agencies could impose a tax, assessment, or liability upon public lands of the United States. It is clear, therefore, that so long as the said land now owned by the intervener remained public land of the United States no liability created by the state or district attached thereto." (Italics ours.)

The Court further said:

> "The further question then arises: Did the sale and conveyance by the United States to the intervener or her grantor operate to charge it with

> *a pre-existing liability not created or assented to either by the government or its grantee?* This question must also be answered in the negative, for, if the grantee of the United States must take the land burdened with the liability of an irrigation district made to include it *without the assent of the government or the purchaser, it attaches a condition to the disposal of the property of the government without its sanction or consent, and which must, in such cases, interfere with its disposal."* (Italics ours.)

The facts in this case are identical with the facts in the case at bar. The reasoning of the opinion is appealing. We have found no contrary authority.

In the case of *Pierce, et al, v. Drainage District No. 17, Mississippi County,* decided by the Supreme Court of Arkansas, and reported in 155 Ark. p. 89; 244 SW 342, it was contended that the lands in question were not subject to assessment for drainage purposes in Drainage District No. 17 of Mississippi County because the title to the land was in the United States when the drainage district was organized. The Supreme Court of Arkansas, in denying the correctness of this insistence, very properly said:

> "A complete answer to this objection appears to be that the Federal Government, through the Congress, *has expressly consented* that the lands be taxed for drainage purposes; and we see no reason why the Federal Government might not, at its own election, assume the ordinary duties of proprietor ship (Italics ours)."

The logical converse of this propostion is that the lands, in their very nature, being incapable of subjection to special assessment for local improvement, cannot be taxed

where the Federal Government has *not expressly consented thereto.*

It has been urged in this case that the lands of plaintiffs in error have received a benefit for which they should pay. The lands of the United States received the benefit; plaintiffs in error succeed to the right to own and use the lands in their benefited condition. The improvement district was created without the consent of plaintiffs in error; they could not be heard to oppose its organization; they could not protest against the inclusion of the lands within the district, and the attempt to now charge against the lands their proportion of the cost of the benefits is an effort to do by indirection what cannot be lawfully done directly.

The original petitioners must have known what lands were within the district which they proposed to create; the Commissioners of the district must have known what lands were within its boundaries which could be legally impressed with the burden of paying for such improvement, and the County Court must have approved only legal assessments upon the lands within the district sufficient to pay the cost of the improvement. If they chose to proceed with the improvement, knowing that the lands now owned by plaintiffs in error would not, and could not, in the very nature of things, be compelled to pay any part of the cost thereof, they should not now be encouraged in the attempt to reimburse the other landowners at the expense of plaintiffs in error.

The cases of *Seattle v. Kelleher,* 195 U. S. 351, and *Wagner v. Baltimore,* 239 U. S. 207 (cited by the Supreme Court of Arkansas), are not authority for the proposition that *these lands* may be assessed for local improvements constructed while the property of the United States. These

cases are authority *only* for the proposition that assessments may be made upon *executed considerations*. In the instant case, when was the consideration executed? *At a time when the lands could not be taxed.*

It is apparent from reading these opinions and the other decisions of this Court that, whenever assessments have been permitted upon improvements constructed prior to the time of the assessment, or upon "executed considerations", there has been no *inherent inability* to subject property to its liability for special assessment for local improvement, and the doctrine of relation has been brought into play in order to uphold the validity of such assessments. Their validity depended upon the special benefits derived by the property *at the time of the construction of the improvement.*

The Act of the Legislature of Washington, upheld by this Court in the *Seattle v. Kelleher* case, supra, provided that the lands should be assessed

> "to the exent of their proportionate part of the expense thereof, and in case the *cost* shall exceed the *actual value* of such local improvement the new assessment or re-assessment shall be for and based upon the *actual value* of the same *at the time of its completion*" (Italics ours).

The Act clearly relates back to the *time of making the improvement.*

Since the decision of the case at bar, the Supreme Court of Arkansas has had occasion to pass upon the validity of a similar Act of the Arkansas Legislature. In the case of *Road Imp. Dist. No. 60 v. St. L. S. F. Railroad Co.*, 164 Ark. 442, that Court said:

> "We have in many cases decided that the General Assembly could in the first instance have made an assessment of the benefits in an improvement district, and it had the right, therefore, to do so at a later date, and the confirmation of the assessments was *retroactive in effect,* and amounted to the making of the assessment by the General Assembly, and this is true, although the Act of the Legislature so doing afforded no opportunity to the owners of property in the district to contest their assessments (Italics ours)."

By whatever name called, and by whatever method effected, an assessment or re-assessment for improvements constructed prior to the passage of the statute providing therefor, is *retroactive* in effect to *the time of making the improvement.*

To re-state the proposition, the distinction between the case at bar and the cases of *Seattle v. Kelleher,* supra, and *Wagner v. Baltimore,* supra, is that the assessment or re-assessment in the instant case is one which could not have been made *at all* at the time of the creation of the district and the construction of the improvement. It is, therefore, analogous to the attempt to validate a proceeding void, not because of procedural defects, but because of the *inherent nature of the transaction.*

When the United States ceases to have any proprietary interest in property, it becomes private property, and as such, subject to general taxation.

> *People v. Shearer,* 30 Cal. 645;
> *Carroll v. Safford,* 3 How. (U. S.) 441;
> *(Opinion of the Court)* (R. 14-15).

With like reason it becomes subject to special assessment for local improvement.

> *(Opinion of the Court)* (R. 14-15).

But, it is *not subject to general taxation* asserted against it while the property of the United States; with like reason it is not subject to special assessment for an improvement constructed upon it while the property of the United States.

The collection of a tax may be ratified although there was no authority at the time for its collection.

United States v. Heinszen & Co., 206 U. S. 370.

An assessment may be made for an improvement previously constructed, or upon an executed consideration.

Seattle v. Kelleher, supra.

Wagner v. Baltimore, supra.

But, back-taxes cannot be asserted against property of the United States; the collection of a tax upon property of the United States cannot be ratified. Similarly, special assessments for an improvement placed upon property of the United States can neither be asserted nor ratified. The time of transfer of title marks the beginning of taxability for general purposes and for special assessments as well. *From that time on*, the property must bear the burden of taxation, but before that time it cannot be reached.

The assessments levied against these lands prior to January 3, 1921, are void (R. 9). Can it be that, because the cost of the improvement was permitted to be paid in installments, the lands of plaintiffs in error can from henceforth be compelled to pay a portion of such installments? Obviously not. The liability for the entire cost of the improvement is fixed upon the property within the district at the time of its creation, the assessment of

benefits, and the issuance of its bonds. The lands legally within the district at that time are impressed with a lien, not for yearly installments of the cost of the improvement, but for the entire cost thereof. So far as the determination of this case is concerned, the legal principles applicable to its solution are the same as though the entire cost of the improvement had been collected from the lands legally within the district during the first year of the existence of the district, and prior to the time of the transfer of title from the United States to plaintiffs in error. Had such been the case, would anyone be bold enough to say that the lands of plaintiffs in error could now be compelled to contribute to those who paid for such improvement, their proportionate part of its cost? To ask the question is to answer it.

It is respectfully insisted that the attempt to assess for a local improvement constructed while the United States was the owner of the land is analogous to the attempt to assess for general taxation while the lands were so owned. Neither attempt may succeed.

> (2) Assuming that the lands in question *might, by proper proceedings,* be subject to assessment, is the assessment in the instant case justified by the law under which defendant in error proceeded, which administration of the law by defendant in error has been approved by the Supreme Court of Arkansas?

Section 5399, Crawford & Moses' Digest of the Statutes of the State of Arkansas, is as follows:

> "Whenever a majority in land value, acreage or number of landowners within a proposed road improvement district in any county shall petition the county court to establish a road improvement district to embrace a certain region which it is in-

tended shall be embraced within the boundaries of the proposed district, and shall file a plat with said petition upon which the boundaries of the proposed district shall be plainly indicated, showing the roads which it is intended to construct and improve as nearly as practicable, and shall also file a good bond conditioned that petitioners will pay all court costs and legal advertising that may accrue in the event said district is not established, it shall then be the duty of the county court to give public notice by publication in some weekly newspaper having a bona fide circulation in said county by three consecutive insertions therein that said petition has been filed, and giving a description of the territory embraced in said petition in as large subdivisions or calls as practicable, and calling upon all persons, firms or corporations owning land or other real property within the proposed district to appear before the county court on some date to be fixed by the court not less than five days after the last insertion of said notice to show cause for or against the establishment of said district. The original petition may be circulated among the landowners, or such number of exact copies of same as may be deemed necessary may be circulated, and when all of said petitions are filed at or before the time of the hearing above-mentioned the said petitions shall be consolidated and treated as one petition, if same are filed before or at the date of said hearing."

Section 5400 provides for the filing of preliminary plans. The pertinent provisions of Section 5401 are:

"The County Court, at the hearing provided for, shall determine the sufficiency of the petition * * * and any person who objects to the formation of said district shall present his objection in writing. If it appears to the County Court that the petition is signed by either a majority in land value, in acreage, or in number of land owners within the proposed district, and if the County Court deems it to the best interest of the county and the landowners

in said district, it shall be the duty of the County Court to make an order establishing said district. Such majority in acreage, number of landowners, or majority in land value to be determined by the assessment for the purpose of general taxation in force in said county at the time."

Section 5402:

"The order of the County Court establishing a road improvement district shall have the force and effect of a judgment and shall be deemed conclusive, final and binding upon all territory embraced in said district and shall not be subject to collateral attack, but only to direct attack on appeal."

Section 5403 provides for an appeal from the order of the County Court establishing or refusing to establish the district.

Sections 5405, 5406, 5419 and 5420 relate to the appointment and oath of office of commissioners and assessors.

Section 5421 relates to the assessment of benefits to be made by the assessors.

Section 5423 provides for notice of the assessment which

"Shall call upon any person, firm or corporation, aggrieved by reason of any assessment to appear before the County Court on some day to be fixed by the court, not less than five days after the last insertion therein, for the purpose of having any errors adjusted or any wrong or grievous assessment corrected * * *".

Section 5424:

"At the hearing provided for in the preceding section and after the County Court shall have considered the assessment of benefits it shall enter its

findings thereon, either confirming the assessment of benefits against said property, increasing or diminishing same, and the order made by the County Court shall have all the force and effect of a judgment against all real property in said district, and it shall be deemed final, conclusive, binding and incontestable, except by direct attack on appeal."

Section 5426 relates to the bringing in of other lands benefited by the improvement.

Section 5427 entitles the property owners to a hearing upon notice

> "to appear and show cause why the boundaries of the district should not be extended so as to include the property so assessed, and to make any objections they may have to the assessment of the benefits so made * *".

Section 5429:

> "Whenever the commissioners or any owners of real property find that by reason of any change of plans or alteration thereof, or by the construction of any lateral roads or extension into adjoining territory, the assessment of benefits previously made on any land has become inequitable by reason of said change, they may petition the county court to equalize, lower or raise the said assessment, and when such petition is filed it shall be the duty of the county court to instruct the assessors for said district to reassess the benefits upon the lands or other real property of those complaining after such changes have been made or lateral road constructed or extensions made, and said assessment shall be approved by the county court, or increased or diminished, and as reassessed shall be final and binding on the property, but when such an assessment is made in accordance with this section if the district has issued bonds or other negotiable evi-

dences of indebtedness the total amount of the assessed benefits in the district shall not be diminished. From such assessment appeal may be taken as herein provided by Section 5424, but any appeal taken shall affect only the particular tract of land concerning which said appeal was taken."

Section 5430:

"The board of commissioners may not oftener than once a year order a reassessment of the benefits, which shall be made, advertised, revised and confirmed as in the case of the original assessment and with like effect; but if the district shall have issued interest-bearing evidence of the debt, the total amount of the assessed benefits shall never be diminished."

Section 5432, which comes after the "reassessment provisions" of Sections 5429 and 5430, but which relates back to the earlier sections of the Act, as will be seen from an examination thereof, reads:

"The County Court shall at the same time that the assessment of benefits is filed by the commissioners for said district, enter upon its record an order which shall have all of the force and effect of a judgment, providing that there shall be assessed upon the real property in the district a tax sufficient to pay the estimated cost of the improvement with ten per cent added for unforseen contingencies, which tax is to be paid by the real property of the district in proportion of the amount of the assessment of benefits thereon, and which is to be paid in annual installments, payable not to exceed twenty per cent for any one year as provided in such order."

Section 5433, in part, reads as follows:

"The tax so levied shall be a lien upon all of the

real property in the district from the time same is levied by the County Court * * ."

The Act provides for notice to and a hearing by all landowners before their land is included within the district, whether brought in under the original petition prescribed by section 5399, or sections 5426 and 5427. It does not profess to confer upon the commissioners or the county court the power to assess lands or re-assess lands which have not been given an opportunity to protest against their inclusion within the district. By this Act the Legislature entrusted to the Commissioners of the improvement district and to the Board of Assessors, subject to the confirmation of the county court, the determination of the lands to be benefited by the improvement, and the amount of the benefits. The Legislature did not pretend to determine these matters for itself.

The cases in all of the courts of the various states, as well as in this Court, upon the question of necessary notice and opportunity for hearing to bind lands for special assessments for local improvements, without violating the due process of law clause of the Federal Constitution readily fall into two classes:

(1) Where the Legislature decides upon the location, boundaries and needs of an improvement district and decides that the lands in such district would be benefited by its creation, no notice nor opportunity for hearing upon the question of propriety of creation of the district, nor whether said lands will in fact be benefited by the improvement need be accorded the landowner.

(2) When the district is not established by the Legislature, but by an exercise of delegated authority, it *is essential to due process of law* that the landowners be accorded an opportunity to be

> heard upon the question of whether their lands would, *in fact, be benefited* by the proposed improvement.

The failure to apply this distinction is responsible, in our opinion, for the decision of the learned Supreme Court of Arkansas.

In the case of *Spencer v. Merchant,* 125 U. S. 345, this Court had before it the question of legislative determination of an improvement district and the benefits to be derived therefrom, and this distinction was well expressed in an able opinion by Mr. Justice Gray. At page 353, he said:

> "The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but it is not bound t do so, and may settle both questions for itself; and when it does so, its action is necessarily conclusive and beyond review. Here an improvement has been ordered and made, the expense of which might justly have been imposed upon adjacent property benefited by the change. By of the act of 1881, the legislature imposes the unpaid portion of the cost and expense, with the interest thereon, upon that portion of the property benefited which has thus far borne none of the burden. In so doing, it necessarily determines two things, viz., the amount to be realized, and the property specially benefited by the expenditure of that amount. * * *"

At page 356, the opinion reads in part:

> "In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the legislature of the State, having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed

either, like other taxes, upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax, and the class of lands which will receive the benefit and should therefor bear the burden, *although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners.*" (Italics ours.)

"*When the determination of the lands to be benefited is entrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether their lands are benefited and how much.* But the legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited." (Italics ours.)

In the case of *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, this Court, through Mr. Justice Peckham, said:

"Unless the legislature decide the question of benefits itself, the land owner has the right to be heard upon that question before his property can be taken. This, in substance, was determined by the decisions of this court in *Spencer v. Merchant*, 125 U. S. 356, and *Walston v. Nevin*, 128 U. S. 578."

The case of *French v. Barber Asphalt Paving Company*, 181 U. S. 324, reviews a number of the important decisions of this Court upon this question.

It can serve no good purpose to refer to all of the cases

in this Court, but the distinction between cases of legislative determination of benefits, and determination of benefits by exercise of delegated authority is a *real* distinction and is clearly established.

Seattle v. Kelleher, supra, and *Wagner v. Baltimore,* supra, fall within this class.

> *Rd. Imp. Dist. No. 6 v. St. L. S. F. Railroad Co.,* 164 Ark. 442;
>
> *Massey v. Arkansas and Missouri Highway Dist. in Pulaski County,* 163 Ark. 63.

(2) In those cases where the Legislature has entrusted to subordinate bodies the determination of benefits, notice must be given to the landowners proposed to be assessed, and a hearing accorded them on the question of whether their lands would, *in fact,* be benefited.

This Court, in the case of *Londoner v. Denver,* 210 U. S. 373, said, at page 385:

> "But where the legislature of a State, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing."

The proposition is concisely stated by this Court in the case of *Embree v. Kansas City Road District,* 240 U. S. 242, when Mr. Justice Van Devanter, speaking for the Court, said:

> "As the district was not established by the legislature, but by an exercise of delegated authority, there was no legislative decision that its location, boundaries and needs were such that the lands therein would be benefited by its creation and what it was intended to accomplish, and, this being so, it was *essential to due process of law that the land owners be accorded an opportunity to be heard upon the question whether their lands would be thus benefited.* If the statute provided for such a hearing, the decision of the designated tribunal would be sufficient, unless made fraudulently or in bad faith. *Fallbrook Irrigation District v. Bradley,* 164 U. S. 112, 167, 174-175." (Italics ours.)

Since the decision in this case by the Supreme Court of Arkansas, that Court, in the case of *Massey v. Ark. & Mo. Highway Dist. in Pulaski County,* 163 Ark., at page 72, has said:

> "Where the lawmakers delegate to subordinate agencies or other tribunals authority to make assessments, owners of property are entitled to a hearing, otherwise it constitutes the taking of property without due process of law."

The proposition is well supported by the authorities:

Hager v. Reclamation District, 111 U. S. 701;

Kentucky Railroad Tax Cases, 115 U. S. 321;

Winona & St. Peter Land Co. v. Minnesota, 159 U. S. 526;

Spencer v. Merchant, 125 U. S. 345;

Lent v. Tillson, 140 U. S. 316;

Central of Georgia v. Wright, 207 U. S. 127.

The statute under which defendant in error was created (sections 5399, et seq. of Crawford & Moses' Digest of the

Statutes of Arkansas) is the vehicle by which the Legislature of the State of Arkansas delegated to it authority to establish an improvement district, and assess benefits therefor. Its authority is necessarily circumscribed by the statute itself. It is impossible, from a careful reading of this statute, to reach the conclusion that sections 5429 and 5430 authorize the assessment of the lands of the plaintiffs in error. In the clearest terms the statute provides for a hearing to be accorded to all landowners upon the question of whether their lands will be benefited. The reassessment provisions relate only to those lands which have already been included within the district, in order to correct any inequalities which might have arisen since their inclusion.

At the time of the creation of the district plaintiffs in error could not be heard in opposition to the creation of the district because their lands were exempt from taxation; they could not be heard upon the question of whether the lands would, in fact, be benefited by the improvement, because any benefits accruing to such lands were benefits accruing to property of the United States, for which the United States could not be charged; they had no voice in the creation of the district because in determining majority in acreage, number of landowners, and majority of land value within the district, the assessment for the purpose of general taxation in force in the county at the time was the basis adopted by the Legislature (Sec. 5401). After title passed from the United States to plaintiffs in error, the Board of Assessors of defendant in error, acting in pursuance of supposed authority of sections 5429 and 5430, levied an assessment upon the lands of plaintiffs in error. This assessment was confirmed by the County Court. Plaintiffs in error

were thus given an opportunity only to protest against the *amount of the assessment.* They were not accorded an opportunity to be heard upon the question of whether their lands were in fact benefited by the improvement.

The cases of *Seattle v. Kelleher* and *Wagner v. Baltimore,* supra, cited by the Supreme Court of Arkansas, as determinative of the validity of the assessment, are in no way controlling of the question because in those cases the *Legislatures* of the States of Washington and Maryland, respectively, determined that the lands were in fact benefited by the improvements, and, in accordance with the decisions of this Court, no notice or opportunity for hearing upon the question of whether the lands *were in fact* benefited need be given the land owners in order to afford them due process of law.

In the case at bar, the *Legislature of Arkansas has not determined* that the lands of plaintiffs in error were benefited by the improvement. On the contrary, the Legislature of Arkansas entrusted to defendant in error the authority to determine what lands within the district would be benefited, *after a hearing and opportunity for opposition to the inclusion of lands within the district.* This opportunity has not been accorded plaintiffs in error. They have, therefore, been deprived of their constitutional right to notice and opportunity to be heard upon the question of whether their lands were *in fact* benefited by the improvement.

Fallbrook Irrigation District v. Bradley, supra;

Embree v. Kansas City Road District, supra.

Plaintiffs in error do not complain that an assessment has been levied upon an executed consideration.

(Opinion of the Supreme Court of Arkansas) (R. 15).

Seattle v. Kelleher, supra;

Wagner v. Baltimore, supra.

They do insist that unless they be permitted an opportunity to be heard upon the inclusion of their lands within the district, and upon the question of whether their lands were, *in fact,* benefited by the improvement, they have been deprived of their property without due process of law because the statute under which defendant in error professes to proceed confers this right upon them, and, in deed unless it did so confer such right upon them, the statute itself would be unconstitutional and void.

Fallbrook Irrigation District v. Bradley, supra;

Embree v. Kansas City Road District, supra.

It cannot be said that, because an assessment may be levied upon an executed consideration where the Legislature has conclusively determined the question of benefit derived from such executed consideration, an assessment may also be levied by a subordinate body to whom the authority is delegated by the Legislature not only to determine the *amount of assessment,* but also whether the improvement is *in fact* beneficial to the landowner. The assessment or re-assessment must be made lawfully. The law provides for a hearing upon the question of *benefit in fact,* and plaintiffs in error must be given an opportunity to controvert the question of benefit to their lands unless they are to be deprived of their property, without due process of law.

CONCLUSION.

In presenting this cause we are not unmindful that this Court is burdened with unimportant cases by reason of which its time for the consideration of the many causes of great public concern constantly coming before it, is necessarily curtailed. Yet, we know that this Court, the final arbiter of all judicial matters—the adjudicator of fundamental rights under our system of government—is open to the poor as well as to the rich; not alone to the powerful, but as well to the humblest citizen in all the land. Measured in money our case is unimportant. Weighed in the scale of great public concern, its insignificance is apparent. But, to us, its deliberate consideration will be but the justification of our faith in the wisdom of our fathers when they established this Court as the bulwark of our constitutional guaranties, without which our institutions cannot endure.

We believe in the merit of our case. Believing in it, we have attempted to present it as best we can for the consideration of this Court, in order that justice may be done. We ask that the decision of the Supreme Court of Arkansas be reversed.

Respectfully submitted,

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